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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

R.F.,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE
COUNTY,

Respondent;

ORANGE COUNTY SOCIAL
SERVICES AGENCY et al.,

Real Parties in Interest.

G057037

(Super. Ct. No. 18DP0574)

O P I N I O N

Original proceedings; petition for a writ of mandate to challenge an order of the Superior Court of Orange County, Caryl Lee, Judge. (Retired Judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)
Petition denied.

Sharon Petrosino, Public Defender, Kenneth Norelli, Assistant Public Defender and Brian Okamoto, Deputy Public Defender, for Petitioner.

No appearance for Respondent.

Leon J. Page, County Counsel and Karen L. Christensen, Deputy County Counsel, for Real Party in Interest Orange County Social Services Agency.

Law Office of Harold LaFlamme and Yana Kennedy for Minor.

* * *

R.F. (Father) seeks writ relief from the court's order terminating reunification services before the six-month review hearing and setting a permanency hearing pursuant to Welfare and Institutions Code section 366.26 (.26 hearing).¹ Father contends there was insufficient evidence to support the court's finding that there was not a substantial likelihood of reunification. As explained below, we disagree with Father's contention and, accordingly, we deny the petition.

FACTS

The Underlying Dependency Petition

When C.H. (Child) was born, he tested positive for amphetamine and opiates. Child was detained in protective custody the next day and placed in a foster home shortly after. In June 2018, the Orange County Social Services Agency (SSA) filed the underlying petition pursuant to section 300, subdivisions (b)(1) and (g), alleging Father had failed to protect or provide support for Child.² The petition alleged, inter alia,

¹ All further statutory references are to the Welfare and Institutions Code.

² The petition also alleged the mother had failed to protect or provide support

that Father “has an unresolved problem with substance abuse which includes, but may not be limited to, methamphetamine and cocaine.” In particular, the petition alleged the mother reported Father “uses whatever drugs he can get his hands on” and “when . . . [F]ather was arrested about a week prior for probation violation, the police found him in possession of controlled substances.” According to the petition, Father reported he used methamphetamine for most of his life up until the mother found out she was pregnant. The petition also alleged Father had a criminal history of arrests and convictions for numerous drug related offenses. Because Father was incarcerated, the petition claimed Father had “not provided for the safety, protection and support of the child”

Detention and Jurisdiction/Disposition

The next day, the court ordered Child detained and ordered SSA to provide reunification services as soon as possible. In July 2018, SSA filed a jurisdiction/disposition report recommending the court sustain the allegations of the petition and declare Child a dependent. Among other things, the report noted Father was incarcerated due to a probation violation for possession of Suboxone without a prescription. However, according to the report, Father believed he did not have a problem with drugs and would “do whatever it takes to get [Child] back.” The report further stated Father was working through a self-help book while incarcerated and had provided his notes to the social worker.

At the jurisdiction/disposition hearing in July 2018, the court found the allegations in the juvenile dependency petition to be true, declared Child a dependent, and removed custody from the parents, vesting it with SSA. Although the court found reunification services could be bypassed under section 361.5, subdivision (b)(13) because

for Child and noted her criminal history and problems with substance abuse. Because the mother is not a party to this appeal, we do not address those facts.

Father had resisted a prior court-ordered drug treatment program, the court ordered reunification services for Father pursuant to the parties' stipulation. The court authorized a minimum of seven hours of monitored visits per week on the condition that Father was not under the influence of drugs or alcohol. Father, who was no longer in custody, also was allowed to participate in Child's medical visits. The court further authorized drug patch funding and testing as well as on-demand testing for Father. The court noted "[a]ll parties were on notice that if [F]ather fails to make substantial progress in his court ordered case plan by the progress review [hearing, Child] or SSA will move to terminate reunification services at that time." The court set a progress review hearing in October 2018 to monitor Father's compliance with his case plan and a six-month review hearing in January 2019. Finally, the court eventually adopted a case plan involving counseling, parenting education classes, drug testing, and substance abuse counseling.

Interim Review Report and Section 388 Request

In October 2018, SSA filed an interim review report recommending Father's reunification services be terminated and a .26 hearing be set. Among other things, the report stated Father was arrested on October 17, 2018. The report also stated Father's probation officer informed the social worker Father had tested positive for amphetamine and methamphetamine in July 2018 and for 6-monoacetylmorphine and methamphetamine in early October 2018. Despite the drug test results, Father denied any drug use to his probation officer.

According to the report, Father had submitted two additional positive drug patches in September 2018 for opiates and methamphetamine. For the first positive drug patch, Father denied any drug use and claimed it was "probably testing positive because [his] patch fell off a few times because [he] was sweating at work." The social worker contacted the testing facility to ask about Father's explanation, and an employee at the testing facility indicated Father's claim was "nonsense" and "[a]bsolute rubbish." When

the social worker called Father to discuss the second positive drug patch, Father said he would call her back and hung up the phone. SSA also reported Father had failed to timely remove another drug patch applied in October 2018.

As to Father's participation in reunification services, the report indicated Father had attended twenty-nine 12-step meetings from July 2018 to October 2018. With respect to Father's parenting education classes, Father told the social worker the in-home parenting coach was not available during his visitation days, but the coach indicated this was not true. When an intake session was scheduled, Father did not attend. He also was incarcerated by the time of his rescheduled session. With respect to Father's counseling sessions, SSA reported Father attended two sessions. The counselor stated, "[T]he fact that [Father] has come consecutively to two sessions shows he is making an effort to improve." The counselor further indicated Father would need 20 sessions rather than the typical 15 sessions "due to [his] extensive substance abuse and incarceration history." With respect to substance abuse counseling, Father attended four group sessions and one individual session. His counselor stated Father attended regularly and asked a lot of questions. According to the counselor, Father had to attend individual sessions in addition to group sessions to successfully complete the treatment program.

Finally, the report stated Father consistently visited Child two times per week. According to the report, Father took "it upon himself to make [Child's] bottle and feed him, as well [as] change his diaper." Father also played music on his cellphone for Child.

On the same day as the interim review report, SSA filed a section 388 petition to terminate Father's reunification services because he repeatedly tested positive for drugs and was incarcerated. SSA argued Father was unable to meet Child's needs or provide stability.

Progress Review Hearing and Addendum Report

At the progress review hearing in October 2018, Father informed the court his recent incarceration was for a probation violation related to prior charges before Child was born. The court set a hearing for SSA's section 388 petition in November 2018 and authorized Father to have visits with Child at the jail once every 10 days.

On the day before the section 388 hearing, SSA filed an addendum report indicating the social worker had received another positive drug test for Father from September 2018. The drug test was positive for opiates. Father claimed he tested positive because he had sex with the mother who was using drugs. Father also told two social workers he did not get along with his probation officer who allegedly did "whatever he c[ould] to throw [Father] into jail." The report further indicated Father was not eligible to receive reunification services while incarcerated. However, Father had a monitored visit with Child at the jail. According to the report, Father told Child he loved him and cried as the visit progressed.

Section 388 Hearing and Court's Ruling

In November 2018, the court held a hearing on the section 388 petition and heard testimony from the social worker and Father. The social worker testified consistently with her reports. Father admitted he was not honest about his drug use and testified, "I was scared to lose my son and my visits and everything else." However, Father continued to claim one of the drug tests was positive because he had sex with the mother. Despite the two positive drug test results reported by Father's probation officer, Father also stated he believed there was only one positive drug test. Although his drug tests were positive for heroin among other things, Father further claimed he did not "typically use heroin" He acknowledged he was an addict and started using drugs between 16 and 18 years old. He also testified his longest period of sobriety was one month. He claimed he talked to his sponsor and roommate when he had recently relapsed

in October 2018 but still made a “dumb decision” and used drugs out of frustration. Father further explained his recent incarceration was related to a prior charge for smuggling drugs into a detention facility. To ensure long-term sobriety, Father testified he needed to work on things he was “frustrated with.” He claimed additional services would help him deal with his issues.

With respect to his progress, Father testified he had been more responsible since he became a parent and did not “break the law anymore.” He also explained he worked full-time and juggled three different types of counseling. According to Father, he was in step four of the 12-step program, and the meetings “opened [his] eyes to what [he] could gain from being sober.” He testified he completed a parenting packet during his prior incarceration in July 2018 and learned a lot from his visits with Child. He described those visits as “[a]mazing.” He explained he went to one of Child’s medical appointments and was upset he was not informed of the other appointments. He also claimed he wanted to change “the criminal aspect of [his] life.”

At the conclusion of the hearing, the court expressed concern that Father had only admitted to using methamphetamine despite the drug test results, which were positive for other drugs. Even if Father was timely released from custody, the court noted Father only had two months “to address essentially a whole life’s worth of problems and get them to a point where [he] would be able to have [Child] return home and . . . provide everything that [he could].” The court ultimately granted the section 388 petition, vacated the six-month review hearing, and terminated reunification services because it did “not find it likely that reunification would occur.” However, the court authorized funding for Father’s case plan services to continue. The court noted, “[Y]ou have a chance to ask the court to have some more time essentially when you come back, but it’s an uphill battle. It can be done. I’ve granted those requests in the past. I know many of us have been doing it a long time. I have seen it. It’s not a futile effort. I

encourage you to do it. I think that you can.” The court also scheduled a .26 hearing on March 14, 2019.

DISCUSSION

Father does not dispute he was provided reasonable reunification services and instead contends the court erred by terminating his services before the six-month review hearing. He argues “substantial evidence did not support the court’s finding that [his] actions created a substantial likelihood that reunification will not occur.” He points to evidence of his progress, including his visits with Child, participation in services, independent work on a self-help book while incarcerated, and eventual admission he had used drugs. SSA contends the court’s finding was supported by ample evidence, including the failed drug tests and Father’s dishonesty about using drugs. We agree the court’s order is supported by substantial evidence and the court did not abuse its discretion by terminating Father’s reunification services.

Applicable Law and Standard of Review

““[F]amily preservation is the first priority when dependency proceedings are commenced.” [Citation.] To that end, “[w]hen a child is removed from a parent’s custody, the juvenile court ordinarily must order child welfare services for the minor and the parent for the purpose of facilitating reunification of the family.”” (*Fabian L. v. Superior Court* (2013) 214 Cal.App.4th 1018, 1026-1027.) In cases where the child is under three years old on the date of initial removal, “court-ordered services shall be provided for a period of 6 months from the dispositional hearing . . . but no longer than 12 months from the date the child entered foster care . . . unless the child is returned to the home of the parent or guardian.” (§ 361.5, subd. (a)(1)(B).) “The “unique developmental needs of infants and toddlers” [citation] justifies a greater emphasis on

establishing permanency and stability earlier in the dependency process “in cases with a poor prognosis for family reunification.”” (*M.V. v. Superior Court* (2008) 167 Cal.App.4th 166, 175.)

A motion to terminate reunification services prior to the six-month review hearing for a child under three years old must be made pursuant to section 388, subdivision (c). (§ 361.5, subd. (a)(2).) Section 388, subdivision (c)(1) provides: “Any party . . . may petition the court, prior to [the applicable review hearing] to terminate court-ordered reunification services . . . only if one of the following conditions exists: [¶] (A) It appears that a change of circumstance or new evidence exists . . . justifying termination of court-ordered reunification services. [¶] (B) The action or inaction of the parent . . . creates a substantial likelihood that reunification will not occur, including, but not limited to, the parent’s . . . failure to visit the child, or the failure of the parent . . . to participate regularly and make substantive progress in a court-ordered treatment plan.”

“In determining whether the parent . . . has failed to visit the child or participate regularly or make progress in the treatment plan, the court shall consider factors that include but are not limited to, the parent’s . . . incarceration, institutionalization, detention by the United States Department of Homeland Security, deportation, or participation in a court-ordered residential substance abuse treatment program.” (§ 388, subd. (c)(2).) “The court shall terminate reunification services . . . only upon a finding by a preponderance of evidence that reasonable services have been offered or provided, and upon a finding of clear and convincing evidence that one of the conditions [of section 388, subdivision (c)(1)(A) or (c)(1)(B)] exists.” (*Id.*, subd. (c)(3).)

We review the court’s order granting the section 388 petition for abuse of discretion. (*In re Katelynn Y.* (2012) 209 Cal.App.4th 871, 881.) “We will not disturb the court’s determination unless the court has exceeded the limits of legal discretion by making an arbitrary, capricious or patently absurd determination. When two or more inferences reasonably can be deduced from the facts, we have no authority to reweigh the

evidence or substitute our judgment for that of the juvenile court.” (*Ibid.*) We review the court’s factual findings for substantial evidence. (*Fabian L. v. Superior Court, supra*, 214 Cal.App.4th at p. 1028.) In doing so, “we review the record in the light most favorable to the court’s determinations and draw all reasonable inferences from the evidence to support the findings and orders.” (*Ibid.*)

The Court Did Not Abuse Its Discretion by Granting SSA’s Section 388 Petition

Here, the record supports the court’s grant of SSA’s section 388 petition. Father failed five drug tests from July 2018 to October 2018 and recently relapsed in October 2018. Although Father claimed he made progress because he eventually “admitted using drugs” and “testified to being an addict,” Father continued to deny one of his positive drug tests at the section 388 hearing. He further testified he did not “typically use heroin” even though his drug tests were positive for heroin. Father also was recently incarcerated with no clear indication of when he would be released from custody. As the court noted, it was unlikely Father could “address essentially a whole life’s worth of problems and get them to a point where [he] would be able to have [Child] return home and . . . provide everything that [he could]” even if Father was timely released from custody. Thus, we conclude substantial evidence supports the court’s finding that Father’s actions created a substantial likelihood reunification would not occur. (See *In re Aryanna C.* (2005) 132 Cal.App.4th 1234, 1241 [holding termination of reunification services after only three months was proper where the father tested positive for drugs twice, was incarcerated pending trial, had missed assessments, and missed almost all visits].)

Father contends “the isolated facts [SSA] pulled from the context of the record do not constitute substantial evidence.” Instead, Father notes he consistently participated in visits with Child, attended counseling sessions as well as 12-step meetings, and worked through a self-help book. We applaud Father’s efforts, but

“Father’s . . . compliance *with his case plan* must not be confused with the requirement a parent make substantial progress *towards reunification* . . . within the statutorily prescribed time period of six months.” (*Fabian L. v. Superior Court, supra*, 214 Cal.App.4th at p. 1029.) “While Father’s great strides in personal growth will certainly serve him well after his release from custody, it is simply not enough to compel reversal of the court’s [order].” (*Ibid.*)

Father also claims the court’s authorization of funding for Father’s case plan services to continue contradicts SSA’s “claim that reunification will not occur based on Father’s participation and progress in his treatment plan.” We disagree. The court simply encouraged Father to take advantage of additional services, suggested Father could request additional time when released from custody, and noted this was an “uphill battle.” This does not contradict the court’s conclusion that Father’s action created a substantial likelihood reunification would not occur.

DISPOSITION

The petition is denied.

O’LEARY, P. J.

WE CONCUR:

ARONSON, J.

GOETHALS, J.